No. 92-8841

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

KITRICH POWELL, Petitioner

v.

THE STATE OF NEVADA, Respondent.

On Writ of Certiorari
To the Supreme Court of Nevada

BRIEF FOR THE STATES OF UTAH, ARIZONA, CONNECTICUT, HAWAII, IDAHO, KANSAS, KENTUCKY, LOUISIANA, MASSACHUSETTS, MONTANA, NEW JERSEY, OKLAHOMA, OHIO, AND SOUTH CAROLINA, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Amici, focusing on the end result sought by petitioner, respectfully submit that the question presented is:

Did the Nevada Supreme Court correctly decline to retroactively apply the Fourth Amendment exclusionary remedy against statements made by petitioner, who received a probable cause determination four days after his warrantless arrest, given that the "*McLaughlin*" rule, announced while petitioner's conviction was not yet final, requires a judicial probable cause determination within forty-eight hours of such an arrest?

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INTEREST OF *AMICI*

Amici are states who, through their chief law enforcement officers, seek to bring criminals to justice on the strength of relevant evidence. *Amici* acknowledge a concurrent obligation to honor the Fourth Amendment right of all citizens to be free from unreasonable searches and seizures.

The latter obligation is commonly enforced through the judicially-created exclusionary remedy of *Weeks v. United States*, 232 U.S. 383 (1914), and *Mapp v. Ohio*, 367 U.S. 643 (1961), whereby evidence obtained through Fourth Amendment violations is suppressed from use at criminal trials. *Amici* support a policy that reasonably limits that remedy's application to instances in which its purpose--the deterrence of Fourth Amendment violations, is well worth its cost--the loss of relevant evidence from criminal trials. In this brief, submitted under Rule 37.5, Rules of the Supreme Court of the United States, *amici* will demonstrate that no such benefit can be achieved by the remedy's application in this case.

STATEMENT OF FACTS AND PROCEEDINGS

The Crime

The Nevada Supreme Court summarized the evidence upon which Powell's trial jury found him guilty of murder. Over a period of about two months, Powell repeatedly physically abused Melea Allen, the four-year-old daughter of Powell's girl friend. The last of these episodes severely injured Melea's head and neck, causing her to lapse into a coma on November 3, 1989. At that time, Powell took Melea to a Las Vegas hospital, where she died on November 8, 1989. *Powell v. State*, 108 Nev. 700, 838 P.2d 921, 923 (1992) (J.A. 2-21).

The Two Statements to Police

In finding Powell guilty, the jury heard, and necessarily discredited, two statements in which Powell had sought to exculpate himself. The statements were made during two police interviews.

The first interview occurred at the hospital about an hour after Powell arrived there with Melea on November 3.

The interview lasted about forty minutes, during which Powell was twice allowed to leave, to smoke cigarettes (R. 814-16; 838 P.2d at 925, J.A. 7). In that pre-arrest interview, Powell stated that Melea's injury had been caused by an accidental fall from his shoulders during the previous day. He admitted that he occasionally spanked Melea to discipline her, but denied otherwise striking her or intentionally injuring her (838 P.2d at 924, J.A. 5; R. 814-16). At about 3:00 p.m., roughly an hour and a half after the interview, Powell was arrested for child abuse (Br. for Petitioner, at 7).

November 3, 1989 was a Friday. Under Nevada Revised Statutes section 171.178(3) (1986) (NRS 171.178), described by the Nevada Supreme Court as a "timely arraignment" rule, 838 P.2d at 925, J.A. 7, Nevada law enforcement authorities were then permitted seventy-two hours, exclusive of nonjudicial days, to bring an arrestee before a magistrate. While he was not thus "arraigned" on November 3, Powell acknowledges that an "arresting officer's declaration" form was completed that day, according to a date stamp, within an hour after his arrest (Br. for Petitioner, at 7). It is not known whether the "declaration of arrest" went straightaway to a magistrate at that time.

On Tuesday, November 7--still within the "timely arraignment" period of NRS 171.178--two police officers read the jailed Powell his silence and counsel rights, per *Miranda v. Arizona*, 384 U.S. 436 (1966). Powell waived those rights, and a second interview commenced (838 P.2d at 925, J.A. 7; R. 820, 3629-85).

During that post-arrest interview, Powell explained Melea's head and neck injuries consistently with his pre-arrest statement: she had accidentally fallen from his shoulders, he

claimed, on the day before he brought her to the hospital (R. 827, 3646). Powell asserted that various other, older injuries observed by medical personnel were caused by other, minor accidents, and by his physical discipline of Melea (R. 3671-78). He again denied that he had ever intended to injure Melea (R. 3683-85).

Also on November 7, a magistrate found probable cause to arrest Powell on the child abuse charge. It appears, and for purposes of this Court's review *amici* assume, that this finding was made ex parte (838 P.2d at 924, J.A. 5). The following day, after Melea died, the charge against Powell was changed from child abuse to murder. On that charge, Powell first appeared before a magistrate on November 13, 1989 (Powell's Opening Br. to Nevada Supreme Court, at 1; R. 4888). That "arraignment" was untimely under NRS 171.178.

The "Timely Arraignment" Argument

On appeal to the Nevada Supreme Court, Powell complained of the NRS 171.178 "timely arraignment" violation. He did not equate that violation to a Fourth Amendment violation, or invoke the Fourth Amendment in any way. And while he inaccurately asserted a violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), in connection with one or both of his statements to police, he did not allege that either statement was involuntary. Nevertheless, in conclusory fashion, Powell argued that because of the NRS 171.178 violation, his "conviction should be reversed and the Appellant should be set free" (Opening Br. to Nevada Supreme Court, at 82-85; R. 4969-72).

The Nevada court rejected that sweeping demand, determining that Powell's pre-arrest statement was admissible because it was voluntarily made, in a noncustodial setting. 838 P.2d at 925, J.A. 7 ("he was not coerced or involuntarily detained in any way"). The court then held that Powell's November 7 post-arrest statement was also admissible because under Nevada caselaw, the NRS 171.178 "timely arraignment" requirement was waived when Powell, upon receipt of his "*Miranda*" warnings, agreed to speak to the police without counsel present. *Id.*, J.A. 6-7 (citing *Deutscher v. State*, 95 Nev. 669, 601 P.2d 407 (1979) (waiver of "*Miranda*" rights also waives timely arraignment, at which defendant would be informed of same rights), *vacated on other grounds*, ___ U.S. ___, 111 S. Ct. 1678 (1991)). As with the pre-arrest statement, the Nevada court found no record evidence that the post-arrest statement was involuntary. *Id.*, J.A. 7 (referring to both statements).

Importation of Fourth Amendment Issue

But before thus disposing of Powell's state statute-based argument, the Nevada court "initially note[d]" *County of Riverside v. McLaughlin*, ___ U.S. ___, 111 S. Ct. 1661 (1991), in which this Court held that a judicial probable cause determination must be made within forty-eight hours of a warrantless arrest, including nonjudicial days. 838 P.2d at 924, J.A. 5. The *McLaughlin* "forty-eight hour" rule, announced before Powell's conviction was final, gave a bright-line definition to this Court's earlier holding, in *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975), that the subject of a warrantless arrest must "promptly" receive a judicial probable cause determination.

The Nevada court did not explain why it chose to "note" *McLaughlin*. Nevertheless, it ruled that "[t]he *McLaughlin* case renders NRS 171.178(3) unconstitutional insofar that it permits an initial appearance up to seventy-two hours after arrest and instructs that non-judicial days be excluded from the calculation of those hours." 838 P.2d at 924, J.A. 6. That ruling evidently assumed that a post-arrest probable cause determination, and the arrestee's initial court appearance or "arraignment," would necessarily occur in the same proceeding. The court stated: "Based on *McLaughlin*, we hold that a suspect *must come before a magistrate* within forty-eight hours, including non-judicial days, for a probable cause determination." *Id.* (emphasis added).

In a footnote, the Nevada court then explained that its new, *McLaughlin*-based rule would not apply retroactively to Powell's case. This explanation was based upon a three-factor retroactivity analysis set forth in *Tehan v. United States*, 382 U.S. 406 (1966), that examines (1) the purpose of the new rule; (2) the reliance on the prior, contrary rule; and (3) the effect that retroactive application of the new rule would have on the administration of justice. 838 P.2d at 924 n.1 (citing *Tehan*), J.A. 6. Emphasizing the third factor, the Nevada court observed: "Were *McLaughlin* to be applied retroactively, untold numbers of prisoners would be set free because they were not brought before a magistrate within forty-eight hours." *Id.*

Powell now assails the Nevada court's non-retroactivity decision as erroneous under *Griffith v. Kentucky*, 479 U.S. 314 (1987). Despite the mistaken retroactivity analysis used by the Nevada court, *amici* will demonstrate that, for a number of reasons, the court's judgment, affirming Powell's conviction, should not be disturbed.

SUMMARY OF ARGUMENT

Powell's inconsistently-framed argument really asks this Court to apply the Fourth Amendment exclusionary remedy against the post-arrest statement he made to police, and to reverse his conviction. Aside from the alleged "prompt probable cause determination" violation, Powell alleges no other official misconduct that might call the admissibility of his post-arrest statement into question. The initial validity of Powell's arrest is uncontested. Thus only a quite narrow Fourth Amendment issue is presented.

On this issue, the Nevada court used an outmoded analysis to determine that the *McLaughlin* "forty-eight hour rule" for obtaining a probable cause determination should not apply retroactively to Powell. Under current analysis (which may arguably be inapplicable to this case), a new rule of criminal procedure applies to all cases pending on direct review, as was Powell's, when the rule is announced.

However, the Nevada Supreme Court's mistake does not compel relief from its judgment. As a threshold matter, the structure of the Nevada court's opinion reveals that its discussion of *McLaughlin*, along with its retroactivity analysis, was not dispositive of the appeal. The dispositive issue was the one actually presented by Powell--a state statutory violation and the appropriate remedy for the violation. Because the Nevada court decided that issue under independent state law, federal question jurisdiction is absent, and this Court should dismiss Powell's certiorari petition.

If jurisdiction is retained, the Nevada Supreme Court's judgment can be affirmed on several alternative grounds that were not identified by that court. Foremost among such

grounds is the principle, found in *Illinois v. Krull* and *Michigan v. DeFillippo*, that when state authorities act in conformity with law that has not yet been ruled unconstitutional, suppression of evidence derived from such action is inappropriate. Because Powell's probable cause determination was timely under then-existing statutory guidelines and this Court's pre-*McLaughlin* caselaw, Nevada authorities did nothing that the exclusionary remedy should deter, and Powell's post-arrest statement was admissible under the Fourth Amendment.

Next, as this Court held in *Brown v. Illinois*, even when authorities violate the Fourth Amendment, subsequent statements by a criminal suspect should not be suppressed if the violation was not flagrant or designed to elicit the statements. A similar "causation" analysis, in *New York v. Harris*, holds that where probable cause to arrest is established, error in the manner of making the arrest does not require the exclusionary remedy. Such analysis of this case demonstrates that Powell's post-arrest statement was not caused by, or the "fruit" of, any *McLaughlin* "forty-eight hour" violation, and therefore was properly admitted at his trial.

Further, use of the exclusionary remedy against Powell's post-arrest statement cannot advance deterrence of future *McLaughlin* violations. The clarity of *McLaughlin*, by itself, already serves as ample deterrence. It would also be very difficult, at this late date, to resolve the factual ambiguities necessary to prove a *McLaughlin* violation, and whether such violation stems from law enforcement misconduct or judicial error. A harmless error analysis--appropriate were a remand granted to clarify the facts--would probably defeat any prospect for a new trial. Therefore, an

evidentiary remand at this point would waste judicial resources, and should not be granted.

The arguments for affirmance highlight the important Fourth Amendment principle that a criminal defendant who wishes to invoke the exclusionary remedy must do more than merely prove some Fourth Amendment violation. He or she must also demonstrate that the exclusionary remedy--not itself a constitutional right--is appropriate under the circumstances of the case. Re-articulation of this principle is needed to guide future litigants and courts, and is urged by *amici*.

ARGUMENT

PETITIONER CANNOT INVOKE THE EXCLUSIONARY REMEDY FOR THE FOURTH AMENDMENT "FORTY-EIGHT HOUR RULE" VIOLATION THAT HE ALLEGES

A. Powell Seeks to Suppress a Voluntary Statement, Solely Upon Narrow, Fourth Amendment "Prompt Probable Cause Determination" Grounds.

The issue before this Court should be made clear. Powell presents only a Fourth Amendment "prompt probable cause determination" issue, under *County of Riverside v. McLaughlin*, ___ U.S. ___, 111 S. Ct. 1661 (1991), regarding the four-day interval between his warrantless arrest and the ex parte, judicial probable cause finding that upheld the arrest. *Amici* agree that Powell's "timely arraignment" right, and the question of whether he waived that particular right (Br. for Petitioner, at 19-23), are not before this Court. See *McLaughlin*, 111 S. Ct. at 1668-71, and *Gerstein v. Pugh*,

420 U.S. 103, 122-25 (1975) (probable cause determination and other pretrial proceedings, serving different functions, may be combined or separate).

The relief sought by Powell should also be clarified. In the conclusion to his brief, he formally asks only for a remand to the Nevada Supreme Court "for further proceedings" in light of *McLaughlin* and *Griffith v. Kentucky*, 479 U.S. 314 (1987) (Br. for Petitioner at 24). But Powell elsewhere asserts--although in self-contradictory fashion--that "reversal of the conviction," and "the exclusionary remedy of the Fourth Amendment or a remedy under state law" are "require[d]" or "appropriate" for the allegedly unreasonable delay in the probable cause determination after his arrest (Br. for Petitioner, at 1, 8, 10, 11). *Amici* do not perceive this Court to be at liberty to order an undefined "remedy under state law" for the *federal* violation alleged by Powell.

The relief Powell actually seeks, *amici* believe, is the federal, Fourth Amendment exclusionary remedy, suppressing the statement he made to Nevada authorities during the allegedly "unreasonable" delay before his probable cause determination. See *Mapp v. Ohio*, 367 U.S. 643 (1961) (evidence obtained by state authorities by violation of Fourth Amendment is subject to exclusionary remedy); *Brown v. Illinois*, 422 U.S. 590 (1975) (ordering suppression of incriminatory statements given after an illegal arrest). Only that post-arrest statement--not the pre-arrest statement taken at the hospital--is encompassed in Powell's argument (Br. for Petitioner, at 8). Suppression of that "prejudicial" post-arrest statement, Powell assumes, will require that he receive a new trial.

Powell does not allege any other type of constitutional transgression that might call the admissibility of his post-arrest statement into question. The Nevada Supreme Court found that Powell received and voluntarily waived his "*Miranda*" rights before making that statement, and found no indication that the statement itself was involuntary. 838 P.2d at 925, J.A. 7.

Despite that uncontested finding, Powell broadly alludes to the "oppressiveness" of "illegal custody," and to the detrimental "effect of prolonged detention upon the reliability of statements elicited from a suspect" (Br. for Petitioner, at 11). However, Powell has never alleged that his post-arrest statement was in fact involuntary under the "totality of the circumstances" analysis of *Schneckloth v. Bustamonte*, 412 U.S. 218, 223-27 (1973). Therefore, his evident attempt to insinuate an "involuntariness" argument into this certiorari proceeding should be rebuffed. Cf. *Withrow v. Williams*, ___ U.S. ___, 113 S. Ct. 1745, 1750-54 (1993) (distinguishing values served by suppression of evidence under Fourth Amendment, Fifth Amendment, and Due Process voluntariness principles).

Finally, Powell does not argue that his arrest was unsupported by probable cause. A magistrate did find such probable cause, and that finding would be accorded great deference even if Powell had contested it. *Illinois v. Gates*, 462 U.S. 213, 236 (1983). The only "illegal custody" that Powell alleges therefore began at roughly 3 p.m. on Sunday, November 5--forty-eight hours after his warrantless arrest and therefore exceeding the later-prescribed "reasonable delay" period of *McLaughlin*. It ended when, on November 7, the magistrate found probable cause.

In short, the issue presented by Powell is even narrower than he admits (Br. for Petitioner, at 3). He demands an exclusionary remedy against a voluntary statement, made during a two-day period when his custody would have been presumptively unreasonable under *McLaughlin*, 111 S. Ct. at 1670. As follows, Powell's demand should be rejected.

B. Because the Challenged Judgment Turned on State Law, Rather than the Nevada Court's Retroactivity Analysis, This Certiorari Proceeding Should be Dismissed.

As a threshold matter, this Court should reconsider its grant of certiorari to review Powell's argument that the forty-eight hour rule of *McLaughlin* ought to be retroactively applied to his benefit. That argument, rejected by the Nevada Supreme Court, was not dispositive of its ultimate judgment.

Powell has a well-supported point regarding retroactivity. The retroactivity analysis of *Tehan v. United States*, 382 U.S. 406 (1966), used by the Nevada Supreme Court in this case, is identical to that of *Linkletter v. Walker*, 381 U.S. 618 (1965). That analysis has been supplanted by *Griffith v. Kentucky*, 479 U.S. 314 (1987). Now, "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith*, 479 U.S. at 328. The Nevada court mistakenly failed to recognize this.

The Nevada court's mistake arguably demonstrates a flaw in the *Griffith* rule, or at least a need to limit its reach.

The rule's application to this case, as urged by Powell, might compel retroactive appellate suppression of his post-arrest statement, and perhaps a new trial. This is unwarranted, especially in a case like this one, where the alleged Fourth Amendment error is wholly unrelated to the reliability of trial. See *Stone v. Powell*, 428 U.S. 465, 489-91 (1976). To avoid such a result, it could be argued that the *McLaughlin* forty-eight hour requirement does not address the "conduct of criminal prosecutions," and therefore falls outside the ambit of the *Griffith* retroactivity rule. Cf. *Gerstein v. Pugh*, 420 U.S. 103, 122 (1975) (post-arrest probable cause determination is not a "critical stage" in a prosecution).

But such argument need not be addressed, because the Nevada Supreme Court's retroactivity analysis was not actually dispositive of Powell's appeal. The dispositive analysis was the NRS 171.178 "timely arraignment" analysis, and was based entirely upon adequate, independent state law grounds.

Amici are mindful of this Court's preference for a "plain statement" that a state court's judgment rests upon adequate and independent state law grounds. See *Michigan v. Long*, 463 U.S. 1032, 1044 (1983). No such statement appears in the Nevada court's opinion. However, the "plain statement" rule only applies where the independent state ground is not otherwise "clear from the face of the opinion." *Long*, 463 U.S. at 1040-41; *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985). In this case, the structure of the Nevada court's opinion, and its *silence* as to any matter that might have lifted the normal procedural bar to Powell's *McLaughlin* argument, make it clear that the court's judgment rests upon independent state law.

An alert reading of the opinion reveals that the Nevada court did not regard any Fourth Amendment issue to be properly before it. Instead, it "noted" *McLaughlin* in the section of its opinion that bears the heading "*Delay in Appearing Before a Magistrate*." 838 P.2d at 923, J.A. 4 (italics in original). That heading identifies the "timely arraignment" issue that was actually advanced in Powell's briefs to that court (Opening Br. to Nevada Supreme Court, at 82; Reply Br., at 1; R. 4969, 5107). The *McLaughlin* discussion merely prefaced the dispositive analysis. That analysis relied entirely upon state law, interpreting the "timely arraignment" requirement of NRS 171.178, and defeated Powell's argument on appeal.

In other words, the Nevada court "noted" *McLaughlin* in dictum or, at best, as an advisory opinion. While this Court's "case or controversy" jurisdiction, U.S. Const. Art. III, § 2, counsels against such opinions, cf. *Griffith*, 479 U.S. at 322, state courts may feel no such constraints. See Durham, *The New Judicial Federalism and the Policy Making Role of State Supreme Courts*, 2 Emerging Issues in State Constitutional Law 219, 229 (1989) (noting absence of state court "case or controversy" restrictions). Accordingly, the Nevada court probably felt permitted, even obliged, to point out what it perceived as a flaw in the state "timely arraignment" statute.

Correspondingly, the Nevada court almost certainly perceived, correctly, that Powell had waived any Fourth Amendment argument under *McLaughlin*. In fact, *McLaughlin* was decided on May 13, 1991--before either of Powell's state appellate briefs were filed, on October 10, 1991 and February 3, 1992, respectively (R. 4997, 5122). Therefore, on appeal, Powell did not merely forfeit the issue

by default. Rather, properly chargeable with awareness of *McLaughlin*, he knowingly waived any appellate argument under it.

Had the Nevada court deemed it central to the appeal, one would expect its *McLaughlin* discussion to appear under a separate heading, apart from the "timely arraignment" violation actually argued by Powell. Further, the court would have specified its reason(s) for addressing an issue that had been waived. Perhaps those reasons would have included the "plain error" exception that Powell suggests to this Court (Pet. for Cert., at 2; Br. for Petitioner, at 16-18 & nn.).

The court did no such thing. Contrary to Powell's suggestion, the Nevada court never cast its *McLaughlin* discussion in terms of "error" at all--"plain" or otherwise. Nor did it find a *McLaughlin* "violation" (cf. Br. for Petitioner, at 4). Rather, the court merely expressed its view--albeit purporting to "hold," 838 P.2d at 924--that the NRS 171.178 "timely arraignment" statute ran afoul of *McLaughlin*. The court never held that it meant to lift the procedural bar of waiver--a bar that is an established component of Nevada law. E.g., NRS § 47.040 (1986) (Nevada "timely objection" rule, with "plain error" exception); NRS §§ 174.105, 174.125 (1992). In short, the Nevada court did nothing to make its discussion of *McLaughlin* dispositive of its ultimate judgment.

Accordingly, this Court lacks federal question jurisdiction, under 28 U.S.C. § 1257 (1988), to review the Nevada Supreme Court's judgment. This Court should therefore dismiss Powell's certiorari petition, as improvidently granted.

C. The Nevada Court's Judgment Can be Affirmed on the Ground that the Exclusionary Remedy Should Not be Applied Against Petitioner's Post-Arrest Statement.

If this Court retains jurisdiction, the Nevada Supreme Court's mistaken retroactivity analysis still does not require reversal of its judgment. A judgment can be affirmed upon alternative grounds not identified by the court that entered it; this can even be done by reversing an intermediate ruling made en route to the judgment. *Soldal v. Cook County*, ___ U.S. ___, 113 S. Ct. 538, 543 n.6 (1992). In this case, there are several alternative grounds upon which the Nevada court's judgment should be affirmed.

(1) Compliance with Then-Existing Law. This Court has stated that "a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause." *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975) (Br. for Petitioner, at 8). However, even if it is assumed that a *McLaughlin* forty-eight hour violation might require the exclusionary remedy and reversal in some cases, that remedy is not appropriate in this case.

Under the principle embodied in *Illinois v. Krull*, 480 U.S. 340, 349-50 (1987), and *Michigan v. DeFillippo*, 443 U.S. 31, 37-38 (1979), the exclusionary remedy does not apply to evidence obtained by law enforcement conduct that conforms to then-existing law. While Powell relegates this principle to a footnote (Br. for Petitioner, at 12 n.7), it provides the foremost ground for affirming the Nevada court's judgment.

In advancing this ground, *amici* indulge, as does Powell (Br. for Petitioner, at 6), the Nevada court's assumption that at the time of Powell's warrantless arrest, judicial probable cause determinations in Nevada were subject to the same time deadline as the "speedy arraignment" provision of NRS 171.178. See 838 P.2d at 924, J.A. 6. Powell's judicial probable cause determination was made well within that seventy-two hour deadline, excluding, as the statute permitted, the intervening weekend. *Id.*, J.A. 5.

Because they obtained a probable cause determination that was timely under their governing statute, and because that statute had not yet been ruled unconstitutional, Nevada authorities committed no error that justifies application of the exclusionary remedy. Statutes are presumptively valid, and law enforcement authorities are expected to follow them, "until and unless they are declared unconstitutional." *DeFillippo*, 443 U.S. at 37-38. The only "possible exception" to this principle is adherence to "a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." *Id.*; accord *Krull*, 480 U.S. at 349-50.

By no stretch of imagination could NRS 171.178 be deemed "grossly and flagrantly unconstitutional" at the time of Powell's 1989 arrest. In fact, both the statute and the actual timing of Powell's probable cause determination conformed to a pre-*McLaughlin* statement by this Court, suggesting that a delay of *five* days between a warrantless arrest and a judicial probable cause determination was permissible. See *Schall v. Martin*, 467 U.S. 253, 277 n. 28 (1984) (citing *Gerstein*, 420 U.S. at 124 n. 25). Further, in *Gerstein*, 420 U.S. at 123, this Court had "recognize[d] the desirability of flexibility and experimentation by the States"

in providing prompt probable cause determinations, and meeting other pretrial requirements, for warrantless arrestees.

NRS 171.178 certainly did not overextend the flexibility that this Court granted in *Gerstein*. Because Nevada authorities complied with the law as it then existed--eighteen months before the *McLaughlin* forty-eight hour rule was announced, they committed no "misconduct" that the exclusionary remedy should deter.

(2) No "Flagrant" Misconduct, or Causation. In *Brown v. Illinois*, 422 U.S. 590 (1975), this Court rejected a "but for" or "*per se*" analysis for application of the exclusionary remedy against a statement made after an improper arrest. 422 U.S. at 603. The correct analysis, the Court held, looks at the temporal proximity of the arrest and the statement, the presence or absence of intervening circumstances between the arrest and the statement, "and, *particularly*, the purpose and flagrancy of the official misconduct." *Id.* at 603-04 (emphasis added). In this case, even if a *McLaughlin* violation was committed, as Powell insists (Br. for Petitioner, at 4), it would not, under *Brown*, justify suppression of his post-arrest statement.

The "temporal proximity" factor does not fit this case very well, because the *McLaughlin* forty-eight hour violation alleged by Powell was not a circumscribed event, like the illegal arrest in *Brown*. Rather, that post-arrest "violation" lasted about two days, until probable cause to arrest Powell was confirmed by the magistrate, and appears to have encompassed the time when Powell made the statement in question.

Again, however, there is no evidence that Powell was subjected to unusually coercive police conduct at any time during his post-arrest confinement. This gives rise to a significant "intervening circumstance" under *Brown*. Powell makes no claim that he misunderstood his "*Miranda*" warnings, given just before making his post-arrest statement. Accordingly, those warnings should have accomplished their purpose: dispelling the inherently "compelling atmosphere" in which the statement was made. See *Miranda v. Arizona*, 384 U.S. 436, 465 (1966). Therefore, on the facts of this case, Powell's waiver of "*Miranda*" rights was a powerful--perhaps conclusive--intervening circumstance between the alleged *McLaughlin* violation and his post-arrest statement. Cf. *Brown*, 422 U.S. at 603 (warnings alone may not dispel "taint" of Fourth Amendment misconduct).

The "purpose and flagrancy" factor, holding "particular" importance under *Brown*, weighs even more heavily against suppression of Powell's statement. There is no evidence that Nevada authorities, who had probable cause to arrest Powell in the first place, delayed the judicial probable cause determination beyond the not-yet-announced *McLaughlin* deadline with the purpose of thereby extracting a statement from Powell. That delay can hardly be viewed as "calculated to cause surprise, fright, and confusion," as this Court characterized the at-gunpoint arrest, unsupported by probable cause, that took place in *Brown*. 422 U.S. at 596, 606. And the Nevada authorities certainly cannot be faulted for failing to predict that long after Powell's arrest, they would be held to a new promptness standard for obtaining a post-arrest probable cause determination. Thus Powell's claim of a "flagrant" Fourth Amendment violation (Pet. for Cert., at 6) must fail.

In like fashion, this Court reversed a state court order to suppress an arrestee's statement in *New York v. Harris*, 495 U.S. 14 (1990), because it had not been caused by a preceding Fourth Amendment violation. While having probable cause, officers in *Harris* had violated the Fourth Amendment by entering the suspect's home, without consent, to make a warrantless arrest. *Id.* at 16-17 (citing *Payton v. New York*, 445 U.S. 573 (1980)). This Court held that the statement in question, made after the arrestee was removed to the police station and upon waiver of "*Miranda*" rights, was not "the fruit of having been arrested in the home rather than someplace else." *Id.* at 19.

Similarly, in this case, Powell's post-arrest statement to the Nevada police was not caused by the delay in his judicial probable cause determination. He had given a substantially identical, voluntary pre-arrest statement, in which he denied wrongdoing. There is no sign, had his post-arrest interview occurred within the later-announced *McLaughlin* deadline, that Powell would have passed on the opportunity to repeat that denial. In the terms of *Harris*, the statement in question was not the "fruit" of interviewing Powell on November 7, rather than on November 5.

(3) No Future Deterrence, Wasteful Cost. Perhaps Powell's vague prayer for relief reflects a desire to remand this case back to the Nevada courts, to decide whether application of the exclusionary remedy against his post-arrest statement is required. No such remand is appropriate. If Powell were granted suppression upon such remand, it would have no meaningful deterrent effect against *future* "forty-eight hour" *McLaughlin* violations--deterrence that is the prime purpose of the Fourth Amendment exclusionary remedy. *Stone v. Powell*, 428 U.S. 465, 492 (1976).

Amici believe that the *McLaughlin* rule, by itself, deters future violations. The rule gives a bright-line meaning to this Court's prior holding, in *Gerstein v. Pugh*, 420 U.S. 103 (1975), that the subject of a warrantless arrest must receive a "prompt" judicial probable cause determination. With a bright-line standard now in place, future "promptness" violations should be quite rare. Future violations will be further deterred by the mere prospect that when an arrestee is held beyond forty-eight hours without a probable cause ruling, the responsible authorities will be haled into court to explain themselves. *McLaughlin*, 111 S. Ct. at 1670. Suppressing Powell's statement, because of the long-past "violation" in this case, would not meaningfully enhance the built-in deterrence of *McLaughlin*.

Against a non-existent deterrent benefit, the cost of a remand would be excessive and, for Powell, probably futile. Despite Powell's protestations (Br. for Petitioner, at 3-4), no "finding" of a *McLaughlin* violation was made. In fact, if the November 3, 1989 date stamp on the "declaration of arrest" represents the time that the reviewing magistrate received notice of Powell's arrest, there would be no such violation--or at least not one attributable to law enforcement authorities. At most, there would be judicial delay in reviewing the arrest. The exclusionary remedy, aimed only at law enforcement misconduct, not judicial error, would therefore not apply. *United States v. Leon*, 468 U.S. 897, 916-17 (1984).

If law enforcement-caused delay were presumed, it would still be necessary to explore whether "bona fide" powerful reasons justified or excused the delay. *McLaughlin*, 111 S. Ct. at 1670 (delay past forty-eight hours only raises presumption of "prompt probable cause determination" violation). This would be a difficult, costly task, given the

years that have elapsed since the events in dispute. That cost would not be worth the non-existent benefit that would be achieved were a "48 hour" violation confirmed on remand. Cf. *Stone v. Powell*, 428 U.S. at 493.

Even if Powell did show that suppression was appropriate, it would seem only fair to re-examine, upon remand, the Nevada Supreme Court's unanalyzed, rather offhand assertion that the post-arrest statement in question was "clearly prejudicial." 838 P.2d at 924, J.A. 5. That assertion actually referred to both Powell's pre-arrest and post-arrest statements. Because the former statement was not subject to suppression, the admission of the substantially identical post-arrest statement was, in all probability, harmless beyond a reasonable doubt. See *Chambers v. Maroney*, 399 U.S. 42, 52-53 (1970) (erroneous failure to suppress evidence for Fourth Amendment violation can be harmless); *Chapman v. California*, 386 U.S. 18, 20-24 (1967).

In sum, under this Court's sound precedent and the particular circumstances of this case, the cost of suppressing Powell's post-arrest statement, or of finding the facts that might justify suppression, fails to justify the paltry deterrent effect that the exclusionary remedy might have upon future "forty-eight hour" violations. On this basis, the Nevada Supreme Court's judgment should be affirmed.

D. This Court Should Articulate a Two-Part, "Violation Plus Remedy" Pleading Rule for Fourth Amendment-Grounded Motions to Suppress Evidence.

The foregoing arguments for affirmance highlight an important Fourth Amendment principle: A criminal defendant, wishing to suppress probative evidence, cannot succeed by merely proving that the evidence was obtained in connection with some Fourth Amendment violation. Instead, suppression depends upon a showing that the exclusionary remedy--not itself a constitutional right--is appropriate under the circumstances of the case. See *Stone v. Powell*, 428 U.S. 465, 486 (1976); *United States v. Leon*, 468 U.S. 897, 905-13 (1984). *Amici* endorse this principle.

All too often, however, this principle seems lost upon both litigants and the courts that adjudicate Fourth Amendment issues. In this case, for example, the Nevada court appears to have assumed, without analysis, that the exclusionary remedy would necessarily attend any "forty-eight hour" violation under *McLaughlin*. See 838 P.2d at 924 n.1, J.A. 6. Powell apparently wishes to promote this assumption of "automatic suppression" whenever a Fourth Amendment violation is shown.

This Court should re-articulate, in no uncertain terms, that this assumption is false. A two-part, "violation plus remedy" showing is required. This is, in essence, a rule of Fourth Amendment pleading.

Properly observed, this rule has the desired effect of targeting, for the exclusionary remedy, the kind of intentional Fourth Amendment violations against which all citizens

should be protected. After all, *Brown v. Illinois*, 422 U.S. 590 (1975), teaches that "flagrant" violations are the proper target of that remedy. *Mapp v. Ohio*, where the remedy was held applicable to the states, similarly involved deliberate disregard of Fourth Amendment rights. 367 U.S. 643, 644-45 (1961). No such deliberate violation occurred in this case.

CONCLUSION

The state court judgment at bar rested entirely upon state law grounds, and is not subject to review by this Court. Further, there are powerful alternative reasons to affirm the Nevada Supreme Court's judgment. Accordingly, by dismissal of certiorari or by affirmance, that judgment should be left intact.

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DECEMBER 1993